

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

13

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation; HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

BRIEF OF APPELLEES E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., A CORPORATION AND JAMES WESTERVELT.

JAMES WESTERVELT and
MAC A. PROPP,

514 Commercial Exchange Building, Los Angeles,

Attorneys for Appellees.

FILED

JUN - 5 1940

TOPICAL INDEX.

	PAGE
Preliminary statement	1
Argument	2
I.	
No federal question is here involved.....	2
II.	
There is no diversity of citizenship, for it affirmatively appears that complainant and defendants Archer and Westervelt are residents of Los Angeles county, California.....	3
III.	
Complainant's action is barred by res adjudicata.....	3

No. 9480

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation; HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

BRIEF OF APPELLEES E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., A CORPORATION AND JAMES WESTERVELT.

PRELIMINARY STATEMENT.

The Bill of Complaint herein was filed by the complainant Francis A. Howard in *propria persona* and presents to Court and counsel the usual difficulties which occur when a layman attempts to draw his own pleadings.

Appellant in his brief herein cites some 53 authorities, each one of which states good law, but not a single one of which has any applicability whatever to the issues involved on this appeal.

The issues herein involved are so simple and elementary that we shall not burden the Court with any further argument as to appellant's brief, or by citing any authorities.

ARGUMENT.

There are but three points to be considered in deciding this case, as follows:

(1) Is there any Federal question involved which would give jurisdiction to Courts of the United States?

(2) Failing that, does the diversity of citizenship exist, which is necessary to give the Federal Courts jurisdiction?

(3) Is the complainant barred by *res adjudicata* because of the previous judgment against him in the Court of Chancery of New Jersey, which appears in the transcript at pages 48 to 52?

I.

No Federal Question Is Here Involved.

The Bill of Complaint so far as any head or tail can be made of it sounds solely in fraud of a civil nature. Furthermore, not one single fact is alleged in support of any one of the many ill assorted and wrongly joined charges of several different alleged conspiracies.

The only patent ever belonging to complainant mentioned in the bill [Paragraph IX, Tr. p. 8] is one which has long since expired so that any question concerning it has become moot. Even were this otherwise, all of the defendants except Midgley are improperly joined since they are not in anyway connected with the Midgley patent [Bill of Complaint, Paragraph X, Tr. pp. 8-11].

II.

There Is No Diversity of Citizenship, for It Affirmatively Appears [Bill of Complaint, Paragraphs I and II, Transcript p. 3] That Complainant and Defendants Archer and Westervelt Are Residents of Los Angeles County, California.

III.

Complainant's Action Is Barred by Res Adjudicata.

This action is based on a claim of ownership in complainant of the secret formula for "Vitagas" and the process of compounding same [Bill of Complaint, Paragraphs V, VI, VII, VIII, IX, Tr. pp. 5-8]. The action is, therefore, barred and furthermore expressly forbidden and enjoined, by the previous decree in New Jersey [Tr. pp. 48-52].

It will be noted that among the defendants in this action are included Thomas Midgley, Jr., and the Howard-Vaughan Co., Inc., both of whom appear as defendants in the New Jersey action. [Tr. p. 48.] An inspection of said New Jersey decree shows clearly that that action was based by complainant on the same claim to own the "Vitagas" formula as is here asserted and that defendant, the Howard-Vaughan Co., Inc., disputed that claim and asserted ownership thereof in itself. In the third paragraph of that New Jersey decree it is recited that the Court ordered that the parties during the hearing thereon might offer further evidence on "the issue as to whether the right to institute and maintain action * * * on the cause or causes of action mentioned and set forth in said Bill of Complaint, inheres in the said complainant or in the said defendant Howard-Vaughan Co., Inc." [Tr.

p. 49.] What those causes of action were, concerning the ownership of which issue was therein joined, fully litigated [Tr. p. 50] and decided, amply appears, beginning at the bottom of page 50 of the transcript, where the New Jersey Court ordered, adjudged and decreed "that the Howard-Vaughan Co., Inc., a corporation of the state of New York, one of the defendants herein, is the owner of the secret formula for a chemical compound called 'Vitagas,' described in the bill herein and of the process of compounding same, and that the Howard-Vaughan Co., Inc., * * * has the sole right to maintain any action or proceeding based upon such ownership." [Tr. bottom of p. 50 and top of p. 51.]

It is thus amply clear that the same claim of ownership of said secret formula was made in the New Jersey Court as is made here by complainant. Indeed paragraphs V-IX of the bill in this case are identical with corresponding paragraphs in the complainant's bill in New Jersey, as appears from a certified copy of the latter in possession of counsel for appellees herein. Same was produced in Court upon the hearing but the learned trial judge deemed it unnecessary to entertain it in view of the fact that the identity of complainant's claim of ownership of the said formula in this action and in the New Jersey action sufficiently appeared from what was already in the record.

In the New Jersey decree it was "further ordered, adjudged and decreed that the complainant, Francis A. Howard, be and he is hereby restrained and enjoined from bringing, prosecuting or maintaining any action in this court or in any court in this or in any other jurisdiction against the defendants mentioned in the bill of complaint, or any of them upon the cause of action set forth in the

bill of complaint filed herein, *or upon any cause of action based or founded upon any claim of ownership by said Francis A. Howard of the aforesaid secret formula for a chemical compound called 'Vitagas' described in the bill of complaint filed herein and the process for compounding same.*" [Transcript page 51.]

So that if there were any doubts that the causes of action are the same in the two cases, the complainant is still under injunction to file the present action, because it is certainly founded upon a claim of ownership by Francis A. Howard of the secret formula for "Vitagas" and the process for compounding the same and it is sought to be maintained by him against the defendants Thomas Midgley and the Howard-Vaughan Co., Inc., both of whom were defendants in the New Jersey action.

The case is so abundantly clear and elementary that we do not burden the Court with any further argument.

IV.

The appeal should be dismissed with costs.

Respectfully submitted,

JAMES WESTERVELT and
MAC A. PROPP,

By MAC A. PROPP,

Attorneys for Appellees.

514 Commercial Exchange Building, 416 West Eighth
Street, Los Angeles.

